17-596

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1150.

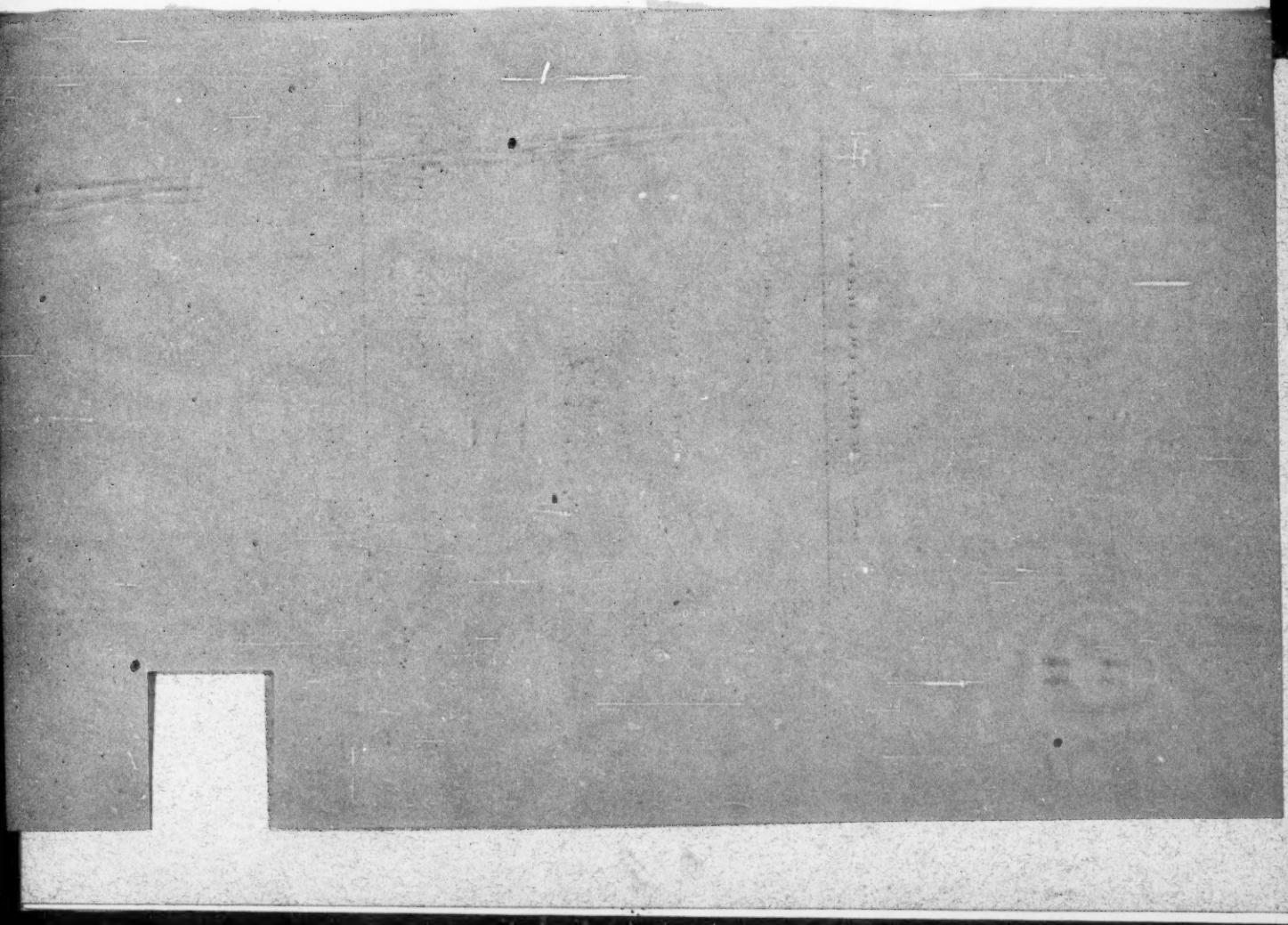
THE UNION TRUST COMPANY OF NEW YORK, APPELLANT,

vs.

JOHN WALKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 8, 1882.



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1 *Placita.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, judge of the seventh judicial circuit, presiding judge of said court, and the Hon. Samuel H. Treat, district judge of said district, and associate judge of said circuit court, on Friday, the 27th day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh year.

J. A. JONES, *Clerk.*

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY, Willis Cauble, and Henry Holbrook. } In chancery.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

2 In the matter of the intervening petition of John Walker, filed in the above-entitled cause.

Be it remembered that on the 6th day of December, in the year of our Lord one thousand eight hundred and seventy-seven, The Union Trust Company of New York, a citizen of the State of New York, by Messrs. Judd and Whitehouse, its solicitors, filed in the office of the clerk of said court its bill of complaint against The Cairo and St. Louis Railroad Company, a corporation organized and existing under the laws of the State of Illinois, and a citizen of said State, defendant; and that afterwards, to wit, on the 6th day of June, in the year of our Lord one thousand eight hundred and eighty-one, came John Walker, by Thomas C. Fletcher, esq., his solicitor, and filed in said clerk's office his intervening petition in the above-entitled cause; and that such proceedings were had in the matter of said intervening petition that afterwards, to wit,
3 on the 27th day of October, in the year of our Lord one thousand eight hundred and eighty-two, the following certificate of division of opinion was filed in said cause, to wit:

Certificate of division.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district, in equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of John Walker, filed in the above-entitled cause.

The matter of the intervening petition aforesaid in the above-entitled

cause was submitted to the Hon. Thomas Drummond, circuit judge, and Hon. Samuel H. Treat, district judge, etc.

4 On the 6th day of December, A. D. 1877, the complainant, The Union Trust Company of New York, trustee, etc., filed its bill of complaint herein for the foreclosure of a mortgage or deed of trust, executed by the defendant in the above-entitled cause on the 2d day of October, A. D. 1871, and recorded before the first day of February, A. D. 1872, in the offices of the recorders of the various counties in the State of Illinois, into or through which the line of the railroad of said defendant was located and afterwards constructed, which mortgage or deed of trust covered all the property, real, personal, and mixed, which the said railroad company then owned or should thereafter acquire, and which bill of complaint prayed, among other things, for the appointment of a receiver of the railroad and of all the other property and assets of the said Cairo & St. Louis Railroad Company covered by said mortgage or deed of trust, and thereupon the complainant in said bill of complaint moved the court for the appointment of a receiver in pursuance of the prayer of the said bill.

5 The court allowed the motion and appointed a receiver by order or decree of that date, in which order or decree the court, of its own motion, inserted a clause, copied as follows, viz:

"The said receiver, after paying the expenses of operating, maintaining, and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said railroad company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of this decree."

The receiver thus appointed qualified and took possession of such railroad property and assets on the same day; and afterwards, on the 6th day of June, A. D. 1881, the petitioner, John Walker, filed in this cause his intervening petition, praying for the allowance of his claim of one thousand six hundred and seventy-five dollars and sixty-two cents ($1,675.62)

6 set forth in said petition, for accounts or claims purchased by him for labor performed for said railroad company within the six months next preceding the appointment of the receiver aforesaid, and which accounts or claims had been assigned to him by the original holders, who performed such labor. An answer was filed by the respondent, The Union Trust Company of New York, aforesaid, neither admitting nor denying the allegations of the petition so far as the same referred to the claim aforesaid, and denying any diversion by the railroad company from the current debt fund or gross earnings of the company to or for the benefit of the mortgage bondholders within four years prior to the appointment of the receiver.

On the hearing before the special master, and afterwards before the court, it was proven by evidence heard in the matter of said intervening petition that the petitioner was the assignee, by purchase, of certain accounts or claims for labor performed for said railroad company within the six months next preceding the appointment of said receiver,

7 which had been by him purchased of the original holders thereof, who performed such labor, and who assigned such accounts or claims to him, he paying par therefor, and which claims amount to the sum

of one thousand six hundred and seventy-five dollars and sixty-two cents ($1,675.62), and which amount remained wholly unpaid.

On said hearing evidence was also heard showing that in the year 1876 a payment of three thousand dollars ($3,000) was made by the said Cairo & St. Louis Railroad Company to the beneficiaries under the mortgage, not to be applied on the bonded indebtedness, but which was applied on account of the expenses of such beneficiaries, to a much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they gave to the said railroad company in respect to overdue interest. This was the only evidence offered or heard tending to show any diversion by the railroad company from the current-debt fund
8 or gross income of the said company to or for the benefit of the mortgage bondholders.

Evidence was also heard (under the objections of said Union Trust Company) showing that while said railroad was in the control of the receiver, under the appointment aforesaid, the net earnings thereof were more than sufficient to pay all the indebtedness of the said railroad company for labor and supplies furnished to said company within said six months next preceding the appointment of said receiver; and also that said net earnings during the time of such receivership were applied from time to time, by order of this court, for the preservation of the property, and, with the consent of the complainant, in purchasing additional grounds and rolling-stock, etc., and in making permanent repairs or improvements upon said railroad property, instead of discharging therewith the claims against said railroad company for labor, materials, and supplies.

It was also proven upon the hearing that the unpaid claims for
9 labor, materials, and supplies furnished to such railroad company, and used upon said road and appurtenances, within the six months next preceding the appointment of said receiver, including the claim of the petitioner, amount to the sum of sixty-five thousand dollars ($65,000) and upwards. For the allowance of these unpaid claims intervening petitions were filed in this cause on or before July 1st, A. D. 1881, and are still pending in this court.

On the hearing of the matter of said intervening petition upon this state of facts, the opinion of the circuit judge prevailing, a decree was entered in favor of the petitioner's claim, as paramount to the indebtedness secured by the mortgage or deed of trust referred in the bill of complaint, in respect to the granting or rendition of which decree the opinion of the judges were opposed upon the following points, the affirmative of each of which was held by said circuit judge, and the negative thereof was claimed by the complainant, The Union Trust Company of New York, as one
10 of the respondents in the matter of said intervening petition, viz:

First. Whether the court, in the order of December 6th, A. D. 1877, appointing the receiver herein, or subsequently in the progress of the cause, had the power to direct the payment out of the money in the registry of the court, or that might thereafter be paid into the registry of the court, arising from the sale of the property covered by the mortgage or deed of trust of claims for labor, similar to those stated in the petition in this case, in preference to the claim arising upon the mortgage or deed of trust to the complainant in this case, there being no evidence showing a previous diversion of money from the current earnings or income of the said rail-

road company prior to the appointment of the receiver herein, except the proof introduced, showing such diversion, in the manner stated, to the extent of three thousand dollars ($3,000.00).

Second. Whether the court, in said order of December 6th, 1877, or subsequently in the progress of the cause, had the power to direct the payment out of the money in the registry of the court, or that might
11 thereafter be paid into the registry of the court, arising from the sale of the property covered by the mortgage or deed of trust of claims for labor similar to those stated in the petition in this cause (and which are not held and owned by the original parties, or those who performed such labor, but have been sold and assigned to purchasers thereof) in preference to the claim arising upon the mortgage or deed of trust to the complainant in this cause, there being no evidence showing a previous diversion from the current earnings or income of the said railroad company prior to the appointment of a receiver herein, except the proof introduced showing such diversion in the manner stated, to the extent of three thousand dollars ($3,000.00).

Third. Whether the court had the right to make the order directing the payment of the claim of the petitioner in this cause, under the circumstances stated and proved.

Consequently, the judges hereby state the said questions, and cer-
12 tify the same, and direct that this certificate hereof be entered of record.

THOMAS DRUMMOND. [SEAL.]
S. H. TREAT. [SEAL.]

(Indorsed:) Filed October 27th, 1882. J. A. Jones, clerk.

And on the same day (being Friday), and in the year last aforesaid, and at the June term of court, the following proceedings were had in said court in said cause, and entered of record, to wit:

Final decree.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY et al. } 5187. In chancery.

In the matter of the intervening petition of John Walker, filed in the above-entitled cause.

And now, on this 27th day of October, A. D. 1882, this cause coming on again in the matter of the said intervening petition of John
13 Walker aforesaid, said petitioner being represented by Thomas C. Fletcher, his solicitor and counsel, and The Union Trust Company of New York, complainant in the above-entitled cause, and respondent in the matter of said intervening petition, being represented by Judd & Whitehouse, its solicitors and counsel, and the exceptions heretofore filed herein of both said petitioner, Walker, and said respondent, The Union Trust Company of New York, to the report of the special master in chancery filed herein, in respect to the matter of the intervening claim of

said petitioner, now coming on to be heard, and the court having heard the arguments of counsel for the respective parties in respect to such exceptions, and being now fully advised in the premises (the opinions of the judges being opposed in respect to sustaining the exceptions of said respondent, and the opinion of the circuit judge prevailing):

It is ordered that said exceptions of the said petitioner, and also the said exceptions of said respondent to said report of said special master,
14 be, and the same are hereby, overruled; and the petitioner now excepts to the decision of the court in overruling his said exceptions, and the respondent, The Union Trust Company of New York, objects and excepts to the overruling of its said exceptions.

And now, the said petitioner having moved the court for judgment according to the said report of the special master aforesaid (and the opinions of the judges being opposed as aforesaid upon said motion, but the opinion of the circuit judge prevailing), it is further ordered that said report of said special master be, and the same is hereby, in all things confirmed; whereto said respondent, by its counsel aforesaid, objects and excepts; and thereupon (the opinion of the judges being opposed as aforesaid upon certain points stated in a certificate of division filed herein, but the opinion of the circuit judge prevailing), it is ordered, adjudged, and decreed that the petitioner is entitled to the payment of his claim so found due by the said special master, to wit, the sum of one thousand six hundred and seventy-five dollars and sixty-two cents ($1,675.62), out of the money now
15 in the registry of this court, or hereafter to come into such registry, arising from the sale of the railroad property and assets covered by the mortgage or deed of trust mentioned and referred to in the bill of complaint in this cause, and that he is so entitled to such payment of his claim as being paramount to the indebtedness secured by the mortgage or deed of trust referred to in said bill of complaint. And it is further ordered, adjudged, and decreed that the clerk of this court pay to said petitioner the sum aforesaid out of any money now in the registry of this court, in this cause, arising from the sale of the railroad property and assets covered by the mortgage or deed of trust aforesaid, or if sufficient money is not now in such registry, then that he pay the aforesaid amount of said claim to the petitioner out of any money arising from such sale that may hereafter come into the registry of the court, and that the respondent pay the costs herein expended; to all of which said respondent, The Union Trust Company of New York, by its counsel, objects and excepts.

Whereupon the said respondent, The Union Trust Company of
16 New York, aforesaid, by Judd and Whitehouse, its solicitors and counsel, having now prayed an appeal to the Supreme Court from this final decree in the matter of said intervening petition of said John Walker, it is ordered and decreed that the said appeal be, and the same is hereby, granted and allowed, the appeal bond, by consent of the parties, to be in the penal sum of five hundred dollars ($500), executed by S. Corning Judd, which bond is now presented and approved by the court.

And thereupon, on the day last aforesaid (October 27th, 1882), the following appeal bond was filed in said cause, and approved by the court, to wit:

Appeal bond.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

17 In the matter of the intervening petition of John Walker, filed in the above-entitled cause.

Know all men by these presents that I, S. Corning Judd, of the city of Chicago, State of Illinois, am held and firmly bound unto the above-name John Walker in the sum of five hundred dollars ($500.00), to be paid to the said John Walker, his executors or administrators, to which payment well and truly to be made I bind myself and my heirs, executors, and administrators, firmly by these presents. Sealed with my seal and dated this 27th day of October, A. D. 1882.

Whereas the above-named The Union Trust Company of New York, trustee, has prosecuted an appeal to the Supreme Court of the United States to reverse the final decree rendered in favor of the said John Walker in the above-entitled suit by the circuit court of the United States of the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named The Union Trust Company of New York, trustee as afore-
18 said, shall prosecute its appeal with effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

S. CORNING JUDD. [SEAL.]

Approved in open court this 27th day of October, A. D. 1882.
S. H. TREAT,
District Judge.

(Indorsed:) Filed October 27th, A. D. 1882. J. A. Jones, clerk.

And afterwards, to wit, on the 1st day of November, in the year last aforesaid, the following stipulation was filed in said clerk's office, in said cause, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

19 THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of John Walker, filed in this cause.

It is hereby stipulated and agreed by and between the parties in the matter of said intervening petition that the bill of complaint, orders, decrees, testimony, and other matters stated and set forth in the record or transcript prepared for the Supreme Court of the United States in the matter of the intervening petition of E. E. Souther & Brother, and certified by the clerk of this court on the first day of November, A. D. 1882, may apply to the matter of the above-named intervening petition, except so far as said record or transcript applies solely to the matter of the said intervening petition of E. E. Souther & Brother, and the same may be referred to and used by either of the parties in the matter of this intervening petition on the appeal herein to said Supreme Court, and may be printed as a part of the record in the matter of the appeal in this cause, if desired by either party.

20 Dated November 1st, 1882.

JUDD & WHITEHOUSE,
Sol'rs & of Counsel for Union Trust Co. aforesaid.
THO. C. FLETCHER,
Sol'r & of Counsel for Petitioner.

(Indorsed:) Filed November 1st, 1882. J. A. Jones, clerk.

And on the day last aforesaid the petitioner, by his solicitor, filed in said clerk's office his waiver of service of citation in said cause, which is in the words and figures following, to wit:

Waiver of citation.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of John Walker, filed in the above-entitled cause.

21 The petitioner in the above-entitled matter, by its solicitor and counsel, hereby waives the issue and service of the citation, and the undersigned, counsel for said petitioner, hereby agrees to appear instanter upon the filing of the transcript and the docketing of the appeal in the above-entitled case.

Dated November 1st, A. D. 1882.

THO. C. FLETCHER,
Sol. & of Counsel for the Intervening Petitioner.

(Indorsed:) Filed November 1st, 1882. J. A. Jones, clerk.

22 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court for said district.

I, John A. Jones, clerk of the circuit court of the United States within and for said southern district of Illinois, do hereby certify that the foregoing are true copies of the certificate of division of opinion filed in said court October 27th, 1882, the final decree rendered by said court on the 27th day of October, 1882, the appeal bond filed in court October 27th, 1882, the stipulation filed in court November 1st, 1882, and the waiver of citation filed in court November 1st, 1882, all in the matter of the intervening petition of John Walker, filed in a certain cause pending in said court, wherein The Union Trust Company of New York is complainant and The Cairo and St. Louis Railroad Company, Willis Cauble, and Henry Holbrook are defendants, as fully as the same appear of record and on file in my office.

23 In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Springfield, in said district, this 2d day of November, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh year.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 1150. The Union Trust Company of New York, appellant, vs. John Walker. S. Illinois C. C. U. S. Filed 8th November, 1882.

United States Supreme Court, October term, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK, Appellant, *vs.* JOHN WALKER, APPELLEE. } No. 1150.

THE UNION TRUST COMPANY OF NEW YORK, Appellant, *vs.* EDWARD FITZGERALD, APPELLEE. } No. 1151.

Appeals from the circuit court of the United States for the southern district of Illinois.

It is hereby stipulated and agreed by and between the parties that the amount found due to appellant, and ordered to be paid by the decree for payment and sale rendered by the court below on the 16th day of May, A. D. 1881, in the foreclosure case against the Cairo & St. Louis Railroad Company and others, wherein the above-named appellees respectively filed their intervening petitions, was the sum of four million three hun-
2 dred and one thousand one hundred and fifty-seven dollars and fifty-three cents ($4,301,157.53), which, with interest at six per cent. per annum, was ordered by said decree to be paid; and that said sum was not inserted in the decree as certified in the case of The Union Trust Company of New York, appellant, vs. E. E. Souther & Brother, appellees, No. 1152, on the docket of the present term of this court, by reason of the mistake of the clerk of the court below in not filling the blanks in a printed copy of the said decree for payment and sale used in making up the transcript for this court.

And it is further agreed that this stipulation may be considered and printed as part of the record in the two causes above entitled.

Dated Dec. 8, 1882.

S. CORNING JUDD, &
WILLIAM F. WHITEHOUSE,
Counsel for Appellant.

THO. C. FLETCHER,
Counsel for Appellee.

(Indorsed:) U. S. Supreme Court, 1882. Oct. term. Union Trust Co. of New York vs. John Walker, No. 1150. Same vs. Edward Fitzgerald, No. 1151. Stipulation to correct record. Filed 11th Dec. 1882.

(Stamp:) Office Supreme Court U. S. Filed Dec. 11, 1882. James H. McKenney, clerk.

6394——1.

OFFICE SUPREME COURT
FILED
JAN 7 1883
JAMES H. McKENNEY, Clerk
17-576

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK, *Appellant,*

vs.

JOHN WALKER, *Appellee.*

No. 1150.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

S. CORNING JUDD,
W. F. WHITEHOUSE,
ATTORNEYS FOR APPELLANT.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

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IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK, *Appellant*,
vs.
JOHN WALKER, *Appellee.*

No. 1150.
Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

I.

STATEMENT.

This case and the two that follow upon the docket are test cases, involving intervening claims filed in a proceeding in the Court below to foreclose a mortgage given by the Cairo & St. Louis Railroad Company to appellant, which claims amount in all to the sum of $65,000 and upwards. The three cases should be considered together.

Most of the more prominent facts are briefly stated in the certificate of division signed by the Judges below, which is copied as follows:

1. "On the 6th day of December, A. D. 1877, the complainant," [in the foreclosure case below, being appellant in this Court], "The Union Trust Company, of New York, trustee, etc., filed its bill of complaint herein for the foreclosure of a mortgage or deed of trust, executed by the defendant in the above entitled cause," (*i. e.*, the Cairo & St. Louis Railroad Company, defendant in the foreclosure case) "on the 2nd day of October, A. D. 1871, and recorded before the first day of February, A. D. 1872, in the offices of the recorders of the various counties in the State of Illinois, into or through which the line of the railroad of said defendant was located and afterwards constructed, which mortgage or deed of trust covered all the property, real personal and mixed, which the said Railroad Company then owned or should thereafter acquire," [also the tolls, income, rents, issues and profits, etc., as see *post*], "and which bill of complaint prayed, among other things, for the appointment of a receiver of the railroad and of all the other property and assets of the said Cairo & St. Louis Railroad Company covered by said mortgage or deed of trust; and thereupon the complainant in said bill of complaint moved the Court for the appointment of a receiver in pursuance of the prayer of the said bill. The Court allowed the motion and appointed a receiver by order or decree of that date, in which order or decree the Court, *of its own motion*, inserted a clause, copied as follows, viz:

'The said receiver, after paying the expenses of operating, maintaining and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said Railroad Company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of this decree.'

"The receiver thus appointed qualified and took possession of such railroad property and assets on the same day; and afterwards, on the 6th day of June, A. D. 1881, the petitioner, John Walker, filed in this cause his intervening petition, praying for the allowance of his claim of one thousand six hundred and seventy-five dollars and sixty-two cents ($1,675.62) set forth in said petition, for accounts or claims purchased by him for labor per-

formed for said Railroad Company within the six months next preceding the appointment of the receiver aforesaid, and which accounts or claims had been assigned to him by the original holders, who performed such labor. An answer was filed by the respondent, The Union Trust Company, of New York, aforesaid, neither admitting nor denying the allegations of the petition so far as the same referred to the claim aforesaid, and denying any diversion by the Railroad Company from the current debt fund or gross earnings of the Company to or for the benefit of the mortgage bondholders within four years prior to the appointment of the receiver.

"On the hearing before the special master, and afterwards before the Court, it was proven, by evidence heard in the matter of said intervening petition that the petitioner was the assignee, by purchase, of certain accounts or claims for labor performed for said Railroad Company within the six months next preceding the appointment of said receiver, which had been by him purchased of the original holders thereof, who performed such labor, and who assigned such accounts or claims to him, he paying par therefor, and which claims amounted to the sum of one thousand six hundred and seventy-five dollars and sixty-two cents ($1,675.62), and which amount remained wholly unpaid.

"On said hearing, evidence was also heard showing that *in the year 1876*, a payment of three thousand dollars ($3,000) was made by the said Cairo & St. Lous Railroad Company to the beneficiaries under the mortgage, *not* to be applied on the bonded indebtedness, but which was applied on account of the expenses of such beneficiaries, to a much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they gave to the said Railroad Company, in respect to overdue interest. This was the only evidence offered or heard tending to show any diversion by the Railroad Company from the current-debt fund or gross income of the said Company to or for the benefit of the mortgage bondholders.

"Evidence was also heard (under the objections of said Union Trust Company), showing that while said railroad was in the control of the receiver, under the appointment

1. "On the 6th day of December, A. D. 1877, the complainant," [in the foreclosure case below, being appellant in this Court], "The Union Trust Company, of New York, trustee, etc., filed its bill of complaint herein for the foreclosure of a mortgage or deed of trust, executed by the defendant in the above entitled cause," (*i. e.*, the Cairo & St. Louis Railroad Company, defendant in the foreclosure case) "on the 2nd day of October, A. D. 1871, and recorded before the first day of February, A. D. 1872, in the offices of the recorders of the various counties in the State of Illinois, into or through which the line of the railroad of said defendant was located and afterwards constructed, which mortgage or deed of trust covered all the property, real personal and mixed, which the said Railroad Company then owned or should thereafter acquire," [also the tolls, income, rents, issues and profits, etc., as see *post*], "and which bill of complaint prayed, among other things, for the appointment of a receiver of the railroad and of all the other property and assets of the said Cairo & St. Louis Railroad Company covered by said mortgage or deed of trust; and thereupon the complainant in said bill of complaint moved the Court for the appointment of a receiver in pursuance of the prayer of the said bill. The Court allowed the motion and appointed a receiver by order or decree of that date, in which order or decree the Court, *of its own motion*, inserted a clause, copied as follows, viz:

'The said receiver, after paying the expenses of operating, maintaining and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said Railroad Company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of this decree.'

"The receiver thus appointed qualified and took possession of such railroad property and assets on the same day; and afterwards, on the 6th day of June, A. D. 1881, the petitioner, John Walker, filed in this cause his intervening petition, praying for the allowance of his claim of one thousand six hundred and seventy-five dollars and sixty-two cents ($1,675.62) set forth in said petition, for accounts or claims purchased by him for labor per-

formed for said Railroad Company within the six months next preceding the appointment of the receiver aforesaid, and which accounts or claims had been assigned to him by the original holders, who performed such labor. An answer was filed by the respondent, The Union Trust Company, of New York, aforesaid, neither admitting nor denying the allegations of the petition so far as the same referred to the claim aforesaid, and denying any diversion by the Railroad Company from the current debt fund or gross earnings of the Company to or for the benefit of the mortgage bondholders within four years prior to the appointment of the receiver.

"On the hearing before the special master, and afterwards before the Court, it was proven, by evidence heard in the matter of said intervening petition that the petitioner was the assignee, by purchase, of certain accounts or claims for labor performed for said Railroad Company within the six months next preceding the appointment of said receiver, which had been by him purchased of the original holders thereof, who performed such labor, and who assigned such accounts or claims to him, he paying par therefor, and which claims amounted to the sum of one thousand six hundred and seventy-five dollars and sixty-two cents ($1,675.62), and which amount remained wholly unpaid.

"On said hearing, evidence was also heard showing that *in the year 1876*, a payment of three thousand dollars ($3,000) was made by the said Cairo & St. Lous Railroad Company to the beneficiaries under the mortgage, *not* to be applied on the bonded indebtedness, but which was applied on account of the expenses of such beneficiaries, to a much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they gave to the said Railroad Company, in respect to overdue interest. This was the only evidence offered or heard tending to show any diversion by the Railroad Company from the current-debt fund or gross income of the said Company to or for the benefit of the mortgage bondholders.

"Evidence was also heard (under the objections of said Union Trust Company), showing that while said railroad was in the control of the receiver, under the appointment

aforesaid, the net earnings thereof were more than sufficient to pay all the indebtedness of the said Railroad Company for labor and supplies furnished to said Company within said six months next preceding the appointment of said receiver; and also that said net earnings during the time of such receivership were applied from time to time, *by order of this Court*, for the preservation of the property, and, with the consent of the complainant, in purchasing additional grounds and rolling-stock, etc., and in making permanent repairs or improvements upon said railroad property, instead of discharging therewith the claims against said Railroad Company for labor, materials, and supplies.

"It was also proven upon the hearing that the unpaid claims for labor, materials and supplies furnished to such Railroad Company, and used upon said road and appurtenances, within the six months next preceding the appointment of the receiver, including the claim of the petitioner, amount to the sum of sixty-five thousand dollars ($65,000), and upwards. For the allowance of these unpaid claims, intervening petitions were filed in this cause on or before July 1, A. D. 1881, and are still pending in this Court," (*i. e.* the Court below.)

"On the hearing of the matter of said intervening petition upon this state of facts, the opinion of the Circuit Judge prevailing, a decree was entered in favor of the petitioner's claim, as paramount to the indebtedness secured by the mortgage or deed of trust referred to in the bill of complaint; in respect to the granting or rendition of which decree, the opinions of the Judges were opposed upon the following points, the affirmative of each of which was held by said Circuit Judge, and the negative thereof was claimed by the complainant, The Union Trust Company of New York, as one of the respondents in the matter of said intervening petition, viz.:

"*First.* Whether the Court, in the order of December 6, A. D. 1877, appointing the receiver herein, or subsequently in the progress of the cause, had the power to direct the payment out of the money in the registry of the Court, or that might thereafter be paid into the registry of the Court, arising from the sale of the property covered by the mortgage or deed of trust, of claims for

labor, similar to those stated in the petition in this case, in preference to the claim arising upon the mortgage or deed of trust to the complainant in this cause, there being no evidence showing a previous diversion of money from the current earnings or income of the said Railroad Company prior to the appointment of the receiver herein, except the proof introduced, showing such diversion, in the manner stated, to the extent of three thousand dollars, ($3,000).

"*Second.* Whether the Court, in said order of December 6th, 1877, or subsequently in the progress of the cause, had the power to direct the payment out of the money in the registry of the Court, or that might thereafter be paid into the registry of the Court, arising from the sale of the property covered by the mortgage or deed of trust, of claims for labor similar to those stated in the petition in this cause, (and which are not held and owned by the original parties, or those who performed such labor, but have been sold and assigned to purchasers thereof), in preference to the claim arising upon the mortgage or deed of trust to the complainant in this cause, there being no evidence showing a previous diversion from the current earnings or income of the said Railroad Company prior to the appointment of the receiver herein, except the proof introduced showing such diversion in the manner stated, to the extent of three thousand dollars ($3,000.)

"*Third.* Whether the Court had the right to make the order directing the payment of the claim of the petitioner in this cause, under the circumstances stated and proved.

"Consequently, the Judges hereby state the said questions, and certify the same, and direct that this certificate hereof be entered of record."

"THOMAS DRUMMOND. [SEAL.]"
"S. H. TREAT. [SEAL.]"

[Record, folios 4 to 12.]

2. It was stipulated between the parties in the Court below, "that the bill of complaint, orders, decrees, testi-"mony and other matters stated and set forth in the rec-

"ord or transcript prepared for the Supreme Court of the "United States in the matter of the intervening petition of "E. E. Souther & Brother, and certified by the clerk on "the first day of November, A. D. 1882," might apply to this case—that is, to the matter of the intervening petition of John Walker in the Court below—so far as applicable, and that the same might "be referred to and used by "either of the parties in the matter of this intervening pe-"tition on the appeal herein to said Supreme Court." [Rec., folio 19.]

The bill of complaint in the foreclosure case, the mortgage or deed of trust, the decree appointing the receiver, the decree for payment and sale, the master's report of the sale, and the testimony of Henry W. Smithers, etc., are fully given in the record of the case referred to in said stipulation, being that of *The Union Trust Company of New York, appellant*, v. *E. E. Souther & Bro.*, No. 1152, on the docket of the present term of this Court.

3. By reference to the mortgage, as printed in that record, the fact appears that the same was given by the Cairo & St. Louis Railroad Company to secure $2,500,000 principal, and accruing interest thereon at the rate of seven per cent. per annum, payable semi-annually, which amount was borrowed "to construct and equip" the railroad of that corporation, (Rec., in No. 1152, folios 40, 41 *et seq.*,) which mortgage covers not only the property and franchises then owned and afterwards to be acquired by the Railroad Company, as stated in the foregoing certificate of division, but also the "tolls, income, rents, issues and profits thereof," etc. The mortgage also provides that "until default," etc., the Railroad Company may remain in possession of the railroad and premises, and "collect, receive and use the "tolls, incomes, rents, issues and profits thereof in any

"manner which shall not impair the lien created" by that instrument. [Record, No. 1152, folios 47–49.]

4. The mortgage likewise provides that "in case of de-"fault in the payment of any semi-annual installment of "interest," etc., then the trustee may enter into possession of said railroad property, etc., and operate the same "by "such superintendents, managers, *receivers*, assistants, and "servants, or other attorneys or agents, as the said trustee "shall deem proper, making from time to time all such re-"pairs and replacements, and all such useful alterations, "additions, and improvements to the said railroad and "premises as the said trustee may deem expedient and "judicious, and * * * collect and receive all tolls, "fares, freights, revenues, incomes, issues and profits of "the said railroad and premises, and of every part and "parcel thereof," and apply the net proceeds thereof to the payment of overdue and accruing interest, etc.[Rec., in No. 1152, folios 50–53.]

5. By the bill of complaint it is averred that the "de-"fendant Railroad Company is insolvent;" "that the "property so mortgaged is insufficient in value to secure "the payment of the bonds" covered by the mortgage; and "that the revenue of the said defendant Railroad Com-"pany is not sufficient to pay the interest on said bonds." [Rec., No. 1152, folio 34.] The decree for payment and sale finds these and all other allegations of the bill to be true. [Rec., No. 1152, folio 88.]

6. By stipulation between the parties, as given in an "Addition to the Record," it will be seen that by the decree for payment and sale, rendered by the Court below on May 16, 1881, the Court found to be due at that date, upon the bonds and coupons secured by the mortgage mentioned in

the bill of complaint, the sum of four millions, three hundred and one thousand, one hundred and fifty-seven dollars and fifty-three cents ($4,301,157.53). [This stipulation was made because the clerk below in preparing the record in the Souther case—No. 1152—used a printed copy of the decree without filling the blanks therein with the statement of the amount found to be due and ordered to be paid.]

7. The master's report of the sale of the railroad property, etc., under the decree for payment and sale, shows that the sale was made on July 14th, 1881, for the sum of four million dollars, ($4,000,000). [See Record in No. 1,152, folios 95, 101.] Hence it will be perceived that the sale was for three hundred and one thousand one hundred and fifty-seven dollars and fifty-three cents, ($301,157.53), less than was found by the Court to be due on the 16th of May preceding. The accrued interest between the 16th of May and the 14th of July would, of course, make the deficiency nearly $30,000 more, up to the time of the sale.

8. The master's report shows also that the purchasers at the time of the sale paid $100,000 into the registry of the Court on the purchase price. [Record, No. 1,152, folio 102.]

9. The decree rendered (the opinion of the Circuit Judge prevailing, as stated in the foregoing certificate of division), provides that "the petitioner is entitled to the "payment of his claim, to wit, the sum of one thousand "six hundred and seventy-five dollars and sixty-two "cents, ($1,675.62), out of the money now in the registry "of this Court, or hereafter to come into such registry, "arising from the sale of the railroad property and assets

" covered by the mortgage or deed of trust mentioned " and referred to in the bill of complaint in this cause, and " that he is so entitled to such payment of his claim as " being paramount to the indebtedness secured by the " mortgage or deed of trust referred to in said bill of " complaint;" and said decree directs accordingly " that " the clerk of this Court pay to said petitioner the sum " aforesaid out of the money now in the registry of this " Court, in this cause, arising from the sale of the railroad " property and assets covered by the mortgage or deed " of trust aforesaid, or, if sufficient money is not now " in such registry, then that he pay the aforesaid amount " of said claim to the petitioner out of any money arising " from such sale that may hereafter come into the registry " of the Court, and that the respondent pay the costs " herein expended." To all of which the respondent, The Union Trust Company of New York, objected and excepted at the time of the rendition of such decree. [Record, folios 12–15.]

The respondent below thereupon prayed an appeal to this Court from said decree, which was granted and perfected. [Record, folios 16–19.]

10. The questions involved at bar, under the state of facts thus presented, are, *First*, whether or not claims such as that of the appellee, ought to be allowed at all, to be paid out of any money in the registry of the Court below, arising from the sale of the railroad property and assets covered by the mortgage or trust deed, or out of any money arising from the sale that may hereafter come into such registry, in preference to the lien and equities existing under the mortgage or deed of trust in favor of appellant, there being no " evidence showing a diversion of " the money from the current earnings or income of the

"said Railroad Company prior to the appointment of the "receiver," as stated in the certificate of division, "except the proof showing that *in the year 1876* a payment "of three thousand dollars ($3,000) was made by the "said Cairo & St. Louis Railroad Company to the beneficiaries under the mortgage, *not* to be applied on the "bonded indebtedness, but which was applied on account "of the expenses of such beneficiaries, to a much larger "amount in keeping an agency in the United States, in "connection with the forbearance which they gave to said "Railroad Company in respect to over due interest," [Rec., "folios 6, 7, 10]; *Second*, if appellee is entitled to any allowance whatever, whether or not the same should be granted as against the prior lien of the mortagee for any more than the proportion that appellee's claim ($1,675.62) bears to the $65,000 and upwards, of unpaid claims for labor, materials, and supplies furnished to the Railroad Company, and used upon its road and appurtenances, within the six months next preceding the appointment of the receiver, [Rec., folio 9]; *Thirdly*, whether appellee, not being the original holder of the claim, but the assignee thereof by purchase, [Rec., folios 6–7], is entitled to the allowance of the same, as against the prior equities of the mortgage bondholders, even if the original owners might be entitled to such allowance if they had not transferred their interest to appellee; and, *Fourthly*, whether the Court below had the right to make the order directing the payment of appellee's claim, under the circumstances stated and proved.

II.

Assignment of Errors.

The appellant, The Union Trust Company of New York, trustee in the mortgage or deed of trust, makes the following assignment of errors:

First. The Court below erred in finding that there was any diversion whatever by the Railroad Company in favor of the mortagees, even to the extent of the three thousand dollars ($3,000) mentioned.

Second. The Court below erred in decreeing that the petitioner below was entitled to the payment of his claim, to the amount of $1,675.62, out of the money in the registry of the Court, or thereafter to come into such registry, *arising from the sale of the railroad property and assets* covered by the mortgage or deed of trust, and that he was so entitled to such payment of his claim, as being paramount to the indebtedness secured by the mortgage or deed of trust referred to in the bill of complaint.

Third. The Court below erred in entering the decree that the clerk of that Court pay to the petitioner below the said sum of $1,675.62, out of any money then in the registry of the Court, or thereafter to come into such registry, arising from the sale of *the railroad property and assets* covered by the mortgage or deed of trust aforesaid, and also in decreeing that the respondent below pay the cost of the proceeding below.

Fourth. The Court below erred in allowing and decreeing the payment of the claim of the petitioner below to any extent, at the most, beyond the percentage of the

three thousand dollars ($3,000) that appellee's claim of $1,675.62 bears to the total amount of $65,000 and upwards of unpaid claims pending in the Court below for labor and supplies furnished the Railroad Company within six months prior to the appointment of the receiver.

Fifth. The Court below erred in entering the decree for the payment of the claim of appellee, as assignee thereof, by purchase from the original owners and holders.

Sixth. The Court below erred in rendering the decree in favor of the petitioner below.

Seventh. The Court below erred in not disallowing the claim of the petitioner below and dismissing the petition.

Eighth. The decree of the Court below is otherwise erroneous, informal, insufficient, etc.

III.

Brief of the Argument.

I.

No Diversion Proven.

1. There is no prentense of any diversion by the Railroad Company for the benefit of the mortgage creditors, unless to the extent of three thousand dollars ($3,000) paid by the Railroad Company "in the year 1876" (at least eleven months before the appointment of the receiver), "on account of the expenses of the beneficiaries "to a much larger amount in keeping an agency in the "United States, in connection with the forbearance which "they gave to the said Railroad Company in respect to "overdue interest." [Rec., folios 7, 8.] See also record in No. 1,152, at folio 140, for Mr. Smithers' testimony in reference to this matter. This forbearance was for the benefit of the Railroad Company alone. The mortgage creditors could derive no advantage thereform.

This is not the kind of a diversion from the current debt fund which would warrant the allowance of the intervening claims for labor or supplies, even to the extent of the per centage that $3,000 bears to the total amount of such claims, namely, $65,000 and upwards.

2. Even if this payment of $3,000 can be regarded as a diversion at all, still it was not made "within the six "months immediately preceding the rendition of the de-"cree appointing the receiver," the same having been made "in the year 1876." [Rec., folio 7.]

The bill to foreclose the mortgage was filed, and the receiver appointed December 6th, 1877. [Rec., folios 4, 5.]

II.

THERE HAVING BEEN NO DIVERSION THERE CAN BE NO RESTORATION. NO EQUITIES AGAINST THE MORTGAGE PRIORITY.

THE LAW.

1. In *Fosdick* v. *Schall*, 99 U. S., 251, this Court holds, that "in the exercise of a *sound judicial* discretion," the chancellor, when asked to appoint a receiver, may "impose such terms in reference to the payment from the "income during the receivership, of such outstanding "debts, for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under "the circumstances of the particular case, appear to be "reasonable."

This "discretion," however, is not left to the caprice of the chancellor. It is a discretion regulated by law. It must be a "*sound judicial* discretion," and the chancellor must "so mould his order, that, while favoring one, injus-"tice is not done to another." *Idem.*, 253.

This Court has defined the bounds within which this "sound judicial discretion" may be exercised, which are, briefly stated, simply, that when a railroad company takes from the current earnings money that in equity belongs to the operatives and supply-men, and diverts it to or for the benefit of the mortgagees, then the net income of the receivership, which otherwise belongs exclusively to the beneficiaries under the mortgage, may be drawn upon

by the chancellor to *pay back* what has thus wrongfully been diverted from the current debt fund.

In other words, if not only the net but also a part of the gross earnings are applied by the railroad company for the benefit of the mortgaged debt, either by way of payment to the mortgage bondholders, or by way of making permanent improvements upon the property, by means whereof the mortgaged security is enhanced, then, and in that case, so far as such earnings and income are trenched upon, over and beyond the net income, the chancellor may order a *restoration* for the benefit of the operatives and material men who contributed to the gross income within the time indicated by the court. "The income out "of which the mortgagee is to be paid is the net income "obtained by deducting from the gross earnings what is "required for necessary operating and managing expenses, "proper equipment and useful improvements."

Fosdick v. *Schall*, *supra*, 252–4.

The chancellor has no "*power*" to overstep these bonds.

This Court say:

"The POWER *rests upon the fact that, in the administration of the affairs of the company*, THE MORTGAGE CREDITORS HAVE GOT POSSESSION OF THAT WHICH, IN EQUITY, BELONGS TO THE WHOLE OR PART OF THE GENERAL CREDITORS. *Whatever is done, therefore, must be with a view to a* RESTORATION *by the mortgage creditors of that which they have inequitably obtained.* **It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of the restoration should be made to depend upon the amount of the diversion."** *Ibid.*, *254*.

It is very clear from this, that the chancellor has no authority, in appointing a receiver, or subsequently in the

progress of the cause, to require debts of a railroad company for labor, supplies, etc., to be paid out of the receivership income, or out of the sale of the *corpus*, except to the extent that the current debt fund has been diverted.

It follows that if, in the merely *interlocutory order* appointing a receiver, the court, *of its own motion*, as in the case at bar, inadvisedly directs such debts to be paid out of the receivership funds, the error will be corrected by subsequent order, or on the final hearing of the intervening claims.

This Court expressly holds, that "*the* POWER *rests*" upon the question of diversion, as indicated; and it follows that where no such diversion appears, there is *no* "*power*" in the chancellor to divert the net income during the receivership from the bondholders.

"*Prima facie*, that fund belongs to the mortgage cred-"itors, and the presumption that thus arises" must be overcome before they can be deprived of it.

Fosdick v. *Schall*, *supra*, 225.

The Court below in the final decree, in our view of the matter, wholly disregarded the spirit and the letter of the rulings referred to in *Fosdick* v. *Schall;* and such decree is therefore erroneous and should be reversed.

2. Special attention is called to the fact that the Court below in the decree appointing the receiver, "*of its own* "*motion*, inserted the clause" providing for the payment of the six months claims for labor and supplies furnished the Railroad Company within the six months immediately preceding the rendition of such decree. [Rec., folio 5.]

There having been no showing, at that time, of any diversion whatever, for the benefit of the mortgage creditors, we insist that it was not "in the exercise of a sound

"judicial discretion" that the order was so modified. And the error should have been corrected on the final hearing, when it appeared *affirmatively* that there had been *no diversion whatever* from the gross income of the Railroad Company to or for the benefit of the mortgagees.

3. The doctrine of *Fosdick* v. *Schall* is considered and approved in *Coe* v. *N. J. Midland R'y Co.*, 31 N. J. Eq., 130, where it is likewise held that there can be no allowance from receivership funds for labor, supplies, etc., furnished the railroad company, unless the company, before the receiver took possession, diverted money belonging to the current debt fund for the benefit of the mortgage creditors.

4. The case of *Hale* v. *Frost*, 99 U. S., 389, is relied upon by opposing counsel; but it does not antagonize *Fosdick* v. *Schall*. On the contrary, it refers to the latter case as furnishing the basis of the decision rendered by this Court. This Court refused to allow a claim for materials furnished "for construction purposes," "but ruled "that payment should be made 'only' for supplies to the "machinery department" furnished within two months prior to the appointment of the receiver, and which supplies "the receiver, after his appointment, continued to "use, and for which nothing had been paid." *Ibid.*, 392.

These supplies "to the machinery department," which the receiver used after his appointment, stand upon a different basis from the claim at bar. Even if put into the machinery before the receiver took possession, they still contributed to the *permanent* improvement, and enhanced the value of the road.

5. The great injustice that would be done in ignoring solemn contract obligations, by advancing a single step,

in the interest of unsecured or general creditors, beyond the spirit and philosophy of the ruling in *Fosdick* v. *Schall*, in respect to diversion as the basis of the power of restoration, is forcibly illustrated by Judge COFER, of the Kentucky Court of Appeals, in his able dissenting opinion in *Douglas, etc.*, v. *Cline, etc.*, 12 Bush, at pages 658 and 672; to which opinion we invite the attention of this Tribunal.

6. In *Dennison et al.* v. *C. A. & St. L. R. R. Co.*, 4 Bissell, 414, the same doctrine is held and forcibly illustrated.

7. The decree below, from which this appeal is taken, directs appellee's claim to be paid out of moneys in the registry of the Court, "*arising from the sale of the rail-*"*road property and assets covered by the mortgage or deed* "*of trust.*" (Record, folio 15.)

The first two points stated in the certificate of division, present the question whether the Court below "had the "power to direct the payment out of the money in the "registry of the Court, or that might thereafter be paid "into the registry of the Court, *arising from the sale of* "*the property* covered by the mortgage or deed of trust, "of claims for labor, similar to those stated in the petition "in this case, in preference to the claim arising from the "mortgage or deed of trust to the complainant," etc. (Record, folios 10, 11.)

We submit that there is no such power under the facts proven in the present case.

8. The mortgage in this case was given "for the pur-"pose of procuring the means necessary to construct and "equip" the railroad of the mortgagor. [Rec., No. 1152, folio 40.]

The railroad was built with the money realized from the bonds secured by the mortgage, and the bondholders, therefore, have a higher equity than that of ordinary mortgage creditors.

The decree below cannot be sustained upon any basis other than of pushing aside the mortgage contract, and "giving priority to the last creditor for aiding to conserve "the thing," on the principle favored in maratime law, which this court has determined cannot be done.

Galveston R. R. v. *Cowdrey*, 11 Wall., 482.

In that case Pulsford had a fourth mortgage for money advanced by him, which, with the iron laid on the road, (upon which iron he had a specific lien before it was laid,) completed and gave almost the entire value to the five miles of road upon which he asked the court to give him a first lien, because his means "applied to the road, saved "it, and rendered it capable of being used, which it would "not have been otherwise;" [*Ibid.*, 464, 465]; and because when the first three mortgages were executed that portion of the road "was not in existence, and could not have "been conveyed thereby, and can only be embraced "therein on a principle of equitable estoppel, which is re-"butted when it comes in conflict with a superior equity." *Ibid.*, 480.

Notwithstanding these facts, this Court repudiated the claim, Mr. Justice BRADLEY delivering a very lucid and forcible opinion, which emphatically enunciates and vindicates the superior equities of prior contract obligations, for which we now contend.—*Ibid.*, 481–2.

In our view, the equities of Pulsford were far superior to those of appellee in the case at bar. All there was of the five miles of railroad, upon which he sought a lien,

was created by means of his money, and yet the prior mortgages took it all. Appellee's claim at bar receives its only vitality, in the present controversy, because of its relation to what was done in the way of "aiding to con-"serve" the mortgaged property.

9. No Statutory Lien. There was no statute of Illinois in force at the time the mortgage in question was given and recorded, nor until some months thereafter, giving any lien upon a railroad for materials or supplies furnished. The mortgage was "recorded before the 1st day of February, A. D. 1872." [Record, folio 4.]

On July 1st, 1872, an act of the legislature of Illinois, passed April 3d of that year, went into effect, by which a lien was given on certain conditions, and under certain limitations, to contractors, laborers, etc., for their claims against railroad companies for labor and materials furnished. R. S. 1874, p. 671; R. S. 1877, p. 639; R. S. 1881, p. 701.

There is no pretence, nor can there be, of any claim, in the case at bar, arising under the statute.

III.

Net Earnings during the Receivership.

The net earnings of the road during the receivership "were applied from time to time, *by order of the Court*, "for the preservation of the property, and, with the con-"sent of the complainant" below, "in purchasing addi-"tional grounds and rolling stock, etc., and in making "permanent repairs or improvements upon said railroad "property, instead of discharging therewith the claims

"against said Railroad Company for labor, materials and "supplies." [Rec., folio 8.]

Opposing counsel contended below, and will doubtless do so here, that this was a diversion of the funds which ought to have been applied for the payment of the claims for labor and supplies furnished the Railroad Company within six months prior to the appointment of the receiver.

This claim is based upon the idea that the income of the receivership was a fund in the control of the Court, to be applied for the benefit of all parties concerned, and that because, in the order appointing the receiver, direction was given for the payment, out of the net income of that officer, of amounts due from the Railroad Company for labor and supplies within the preceding six months, which direction was not followed, therefore there was such a diversion of that income as requires restoration to be made out of the proeeeds of the sale of the mortgaged property.

1. This does not follow. Even if the provision in the decree appointing the receiver, requiring the six months' claims to be paid, was within the range of a "*sound* "*judicial* discretion," (which we insist it was not), still, that order was only an *interlocutory* one, and was subject to modification by the Court below, which was done by subsequent "orders of the Court for the preservation of the "property," etc., as stated. [Rec., folio 8.]

All interlocutory orders in a chancery proceeding, so far as not executed, are "open for revision, and under "the control of the court."

Fourniquet et al. v. *Perkins*, 16 How., 82, 86.

Therefore, the provision for the payment of the six months' claims inserted by the Court below, "of its own "motion," in the decree appointing the receiver, having been afterwards, in the progress of the cause, *modified* by that Court, the case, as it now stands, must be treated the same as if no such provision had been inserted in that decree.

2. Secondly; the net income of the road earned during the receivership belonged to the beneficiaries under the mortgage, and could not lawfully be diverted therefrom for the payment of any general or unsecured claims of the Railroad Company, unless there had been a previous diversion from the gross income of the Company in favor of the mortgaged creditors, as held in *Fosdick* v. *Schall*.

"The income out of which the mortgage is to be paid "is the net income obtained by deducting from the gross "earnings what is required for necessary operating and "managing expenses, proper equipment and useful im-"provements."

Fosdick v. *Schall*, 99 U. S., 252.

The net income earned during the receivership, as before suggested, "*prima facie belongs to the mortgage credit-*"*ors*, and the presumption which thus arises" must be overcome before they can be deprived of it. *Ibid.*, 255.

In *American Bridge Company* v. *Heidelbach*, 94 U. S., 797, a mortgage was given upon the income, rents, issues and profits, as in the present cause. This Court, in the opinion say, say that:

"In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver

appointed, and deliver possession to him. *In either case the income would thereafter be theirs.*"

Ibid., 800.

See also, to the same effect,

Gillman et al. v. *Ill. & Miss. Tel. Co.*, 91 U. S., 603, 617.

See also,

S. E. A. Ins. Co. v. *Stebbins*, 8th Paige's Ch., 565.
Jones on R. R. Securities, § 114.
High on Receivers, § 643.
Jones on Mortgages, § 1536.
Ellis v. *B. H. & E. R. R. Co.*, 107 Mass., 1.
Hayes v. *Dickenson*, 9 Hun. (N. Y.), 277.
Post v. *Dorr*, 4 Edw. (N. Y.), Ch., 412.
Warner v. *Gouverneur's Ex'rs*, 1 Barb., 36.
Beverly v. *Scott et al.*, 4 Gratton, 208.
G. & C. U. R. R. Co. v. *Menzies*, 26 Ill., 121, 148.
M. V. & W. R'y Co. v. *U. S. Ex. Co.*, 81 Ill., 534–536.

IV.

Lien Lost by Assignment.

Appellee is not the original holder of the claims which enter into the amount of his allowance in the Court below, but is assignee thereof by purchase from the original owners. (Rec., folios 6, 7.)

1. We maintain that even if the original holders, had they not assigned their claims, could be held to have any equities in the case at bar, nevertheless their lien was

personal, and not assignable, and cannot be enforced by appellee. Such is the law in the case of a vendor's lien for the purchase price of real estate, even when no rights of third parties intervene. In *Markoe et al.* v. *Andras*, 67 Ill., 34, the Supreme Court of Illinois hold this to be the law, and say that "*Such a lien is not assignable* even by "express language; it is *personal*, and *can only be enforced* "*by the vendor.*" *Ibid.*, 35.

The same doctrine is held in *Richards* v. *Leaming*, 27 Ill., 431; *Keith* v. *Horner*, 32 Ill., 524; *McLowrie* v. *Morans*, 39 Ill., 291; *Elder et al.* v. *Jones et al.*, 85 Ill., 384; *Bonnell* v. *Holt et al.*, 89 Ill., 71; *Small et al.* v. *Stag*, 95 Ill., 39; *Iglehart* v. *Armiger*, Bland's Ch., (Md.,) 519; *Briggs* v. *Hill*, 6 How., (Miss.,) R., 362; *White* v. *Williams*, 1 Paige's R., 501; *Moshier* v. *Meek et al.*, 80 Ill., 79.

2. Even since the railroad lien statute of Illinois, before referred to was enacted, the Supreme Court of that State hold that claims for labor and supplies to railroad companies, "are not assignable, so as to enable the assig- "nee to maintain an action in his own name,"—certainly not "at law." The Court adds that "*even if so assign-* "*able, that would not enable the holder to assign the lien.*" *C. & V. R. R. Co.* v. *Fackney*, 78 Ill., 116, 119.

3. Mechanics and material men, who are given liens by statute, have stronger equities than the owners of such claims as that at bar, because they have the statutory lien in addition to their mere equitable claims; and yet it has been repeatedly held that such liens are lost by transfer. "The general rule is, that *a lien is a personal right, and* "*cannot be transferred.*"

Caldwell v. *Lawrence*, 10 Wis., 331–2.
Daubginy v. *Duval*, 5 T. R., 604.

In *Roberts* v. *Fowler*, 3 E. D. Smith's R., 632, it is held that such an assigned claim cannot be enforced under the lien laws by the assignee. The court say that "*the "lien cannot be effected by an assignee of the claim* of a "contractor, laborer or person furnishing materials."

The same doctrine is held in *Rollins* v. *Cross*, 45 N. Y., 767; also in *Scott* v. *Ward*, 4 Ia., (G. Greene's) R,. 112. And see also *Hawley* v. *Warde*, *Ibid.*, 36.

The case of the *Coal Company* v. *Cent. R. R. Co.*, 99 N. J. Eq., (2 Stew.,) 252–5, is based upon the same general principle. It holds that a contractor who furnishes labor of others is not within the benefit of the mechanics' lien laws, the lien being personal to the laborer himself.

IV.

ARGUMENT.

I.

NO DIVERSION PROVEN.

1. In the certificate of division it is stated that "the "only evidence offered or heard tending to show any di- "version by the Railroad Company from the current debt "fund or gross income of said Company to or for the "benefit of the mortgage bondholders" is "that *in the* "*year 1876* a payment of three thousand dollars ($3,000) "was made by the said Cairo and St. Louis Railroad "Company to the beneficiaries under the mortgage, *not* "to be applied on the bonded indebtedness, but which "was applied on account of the expenses of the bene- "ficiaries to a much larger amount in keeping an agency "in the United States, and in connection with the for- "bearance which they gave to the said Railroad Company "in respect to overdue interest." [Rec., folios 7, 8.] This statement is clearly sustained by the testimony of Mr. Smithers, which is given in full in the Souther & Bro. case; for which testimony see the Record in No. 1,152 of the present docket, at folio 140.

We submit that this does not establish that kind of a diversion from the current debt fund which will warrant any allowance of intervening claims for labor or supplies furnished the Railroad Company, even to the extent of three thousand dollars, ($3,000.) The money was not applied nor "to be applied on the bonded indebtedness." It was paid and applied toward the expense of "keeping

"an agency in the United States" in connection with the forbearance which the mortgage bondholders gave to the Railroad Company. The mortgage creditors got no benefit from the forbearance. This could have resulted only to the Railroad Company.

In the first and second points of division, stated by the Judges below, it will be observed that the Judges seem to hold that that there was a diversion to the extent of this three thousand dollars, ($3,000); but they expressly declare that there is *no evidence* in the record *showing any other diversion* "from the current earnings or income of the Rail-"road Company prior to the appointment of the receiver."

It follows, therefore, in our view of the law, that if any allowance whatever was authorized in the case below, it was only to the extent of the *pro rata* share which appellee's claim bears to the total amount of the claims pending in the Court below for labor and supplies furnished to the Railroad Company within the six months prior to the appointment of the receiver.

2. Secondly, it will be observed, that even if this payment can be regarded as a diversion at all, still it was not made "within the six months immediately preceding "the rendition of the decree appointing the receiver." The evidence and the statement in the certificate of division show that the three thousand dollar ($3,000) payment was made "*in the year 1876.*" [Rec., folio 7.] The bill to forclose the mortgage was filed and the receiver appointed on the *6th day of December, 1877.* [Rec., folios 4, 5.]

Thus it is rendered clear, beyond all dispute, that there was no diversion whatever by the Railroad Company for the benefit of the mortgage creditors within the time indicated by the decree appointing the receiver, inasmuch

as even the three thousand dollar ($3,000) payment is shown to have been made at least *eleven months* before such appointment, having been made sometime "in the "year 1876."

II.

THERE HAVING BEEN NO DIVERSION, THERE CAN BE NO RESTORATION. NO EQUITIES AGAINST THE MORTGAGE PRIORITY.

THE LAW.

1. In *Fosdick* v. *Schall*, 99 U. S., 251, this court has determined that "when a court of chancery is "asked by "railroad mortgagees to appoint a receiver of railroad "property, pending proceedings for foreclosure, the court, "in the exercise of a sound judicial discretion, may, as a "condition of issuing the necessary order, impose such "terms in reference to the payment, from the income dur-"ing the receivership, of such outstanding debts for labor, "supplies, equipment or permanent improvement of the "mortgaged property as may, under the circumstances of "the particular case, appear to be reasonable,"

But this "discretion" is not left to the mere whim or caprice of the chancellor. It is a discretion regulated by law. The chancellor must exercise "a *sound judicial* dis-"cretion," and must "so mould his order, that, while "favoring one, injustice is not done to another." [*Idem*, 253.]

Now let us see upon what basis the chancellor may "impose such terms" as are thus indicated, and what is to be the test of "the exercise of a *sound judicial* discre-"tion" in the premises.

We are not left to the domain of speculative reasoning in this regard; for, in the case referred to, this Court has drawn a clear and distinct dividing line beyond which the chancellor's "discretion" may not rightfully pass. The Court say that:

"When the companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, *in order that bonded interest may be paid*, and a disastrous foreclosure postponed, if not altogether avoided. In this way *the daily and monthly earnings*, which ordinarily should go to pay the daily and monthly expenses, *are kept from those to whom they in equity belong and* USED TO PAY THE MORTGAGED DEBT. *The income out of which the mortgagee is to be paid is the net income*, obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly *agrees that the current debts*, made in the ordinary course of business, *shall be paid from the current receipts*, before he has any claim upon the income. IF, for convenience of the moment, SOMETHING IS TAKEN FROM WHAT MAY NOT IMPROPERLY BE CALLED THE CURRENT DEBT FUND, AND PUT INTO THAT WHICH BELONGS TO THE MORTGAGE CREDITORS, it is certainly not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order *that what is due from the earnings to the current debt* shall be paid by the court from the future current receipts, before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, *until possession of the mortgaged premises is actually taken*, or something equivalent done, the whole earnings belong to the company, and are subject to its control." [*Ibid.*, 252-3.]

"We think, also, that *if* no such order is made when the receiver is appointed, and *it appears in the progress of the cause* THAT THE BONDED INTEREST HAS BEEN PAID, *additional equipment provided, or lasting improvements made* OUT OF EARNINGS WHICH OUGHT IN EQUITY TO HAVE BEEN EMPLOYED TO KEEP DOWN DEBTS FOR LABOR, SUPPLIES AND THE LIKE, it is within the power of the courts to use the *income of the receivership* to discharge the obligations which, BUT FOR THE DIVERSION OF FUNDS, *would have been paid in the ordinary course of business.* This, *not* because the creditors to whom such debts are due, have in law a lien upon the mortgaged property or the income, but, because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; *and* IF THEY GIVE TO ONE CLASS OF CREDITORS THAT WHICH BELONGS TO ANOTHER, *the court may, upon an adjustment of accounts, so use the income which comes into its own hands, as if practicable to restore the parties to their original equitable rights.* While, ordinarily, this power is confined to the appropriation of the income of the receivership, and the proceeds of the monied assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the *court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipments.* In this way the value of the mortgaged property is not unfrequently materially increased.

"*Under such circumstances, it is easy to see that there may sometimes be a propriety in* PAYING BACK TO THE INCOME FROM THE PROCEEDS OF THE SALE WHAT IS THUS AGAIN DIVERTED FROM THE CURRENT DEBT FUND, IN ORDER TO INCREASE THE VALUE OF THE PROPERTY SOLD." [*Ibid.*, 253, 254.]

And again the Court say:

"The POWER *rests upon the fact that in the administration of the affairs of the company,* THE MORTGAGED

CREDITORS HAVE GOT POSSESSION OF THAT WHICH, IN EQUITY, BELONGED TO THE WHOLE OR A PART OF THE GENERAL CREDITORS. *Whatever is done, therefore, must be with a view to a* **restoration** *by the mortgage creditors of that which they have thus inequitably obtained.* **It follows that if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of diversion."** [*Ibid.*, 254.]

There is no mistaking what is meant by this opinion. Human language is incapable of expressing in clearer phrase the holding of this Court, that the chancellor has *no authority*, in appointing a receiver, or subsequently in the progress of the cause, to require debts of a railroad company for labor, supplies, etc., to be paid out of the receivership income, or out of the sale of the *corpus*, except to the extent that the current debt fund has been diverted by the company from the payment of such debts, and *paid to the mortgage creditors, or for equipment or permanent improvements that enhance their security.* It follows that if, in the merely interlocutory order appointing a receiver, the court, as in the case at bar, of its own motion, inadvisedly or erroneously directs that such debts shall be paid out of the receivership funds, the error will be corrected, by subsequent order, or on the final hearing of intervening claims.

This Court expressly holds, that "*the* POWER *rests*" upon the question of diversion, as indicated, and it follows that where no such diversion appears, there is *no* "*power*" in the chancellor to divert the net income during the receivership from the bondholders.

"*Prima facie*, that fund belongs to the mortgage cred-" itors, and the presumption that thus arises " must be overcome before they can be deprived of it. [*Fosdick* v. *Schall*,

supra, 255.] "The income out of which the mortgagee "is to be paid is the *net income* obtained by deducting from "the gross earnings what is required for necessary "operating and managing expenses, proper equipment, "and useful improvements." (*Ibid.*, 252.)

2. In this connection, we recall attention to the important fact that the Court below, in rendering the decree by which the receiver was appointed, "OF ITS OWN MO-"TION, inserted the clause" providing for the payment of claims for labor and supplies furnished the Railroad Company within the six months immediately preceding the rendition of such decree. [Rec., folio 5.] There having been nothing before the Court when that decree was rendered showing any diversion whatever, we submit that, under the ruling in *Fosdick* v. *Schall*, the Court had no *power*, nor was it "the exercise of a *sound judicial* discre-"tion," to thus order payment of such six months' claims, as a condition of the appointment of the receiver. And especially was it beyond the legitimate power of the Court below, on the final hearing of the intervening claim now at bar, to direct the payment of the same, when it appeared *affirmatively* that there had been *no diversion* from the current debt fund or gross income of the Railroad Company to or for the benefit of the mortgage bondholders, within the six months fixed by the decree appointing the receiver, nor at any other time, unless to the extent of the $3,000 paid in 1876, as stated, over eleven months before the receiver was appointed.

3. The doctrine of *Fosdick* v. *Schall* is considered and approved in *Coe* v. *N. J. Midland Railway Co.*, 31 N. J. Eq., 130, where it is likewise held that there can be no allowance from receivership funds for labor, supplies, etc., furnished a railroad company, unless the company, before the

receiver took possession, diverted money belonging to the current debt fund, for the benefit of the mortgage creditors.

4. The case of *Hale* v. *Frost*, 99 U. S., 389, does not antagonize *Fosdick* v. *Schall*, but, on the contrary, refers to that case as furnishing the basis of the decision rendered by this Court. The Union Car Spring Manufacturing Company, within two months prior to the appointment of the receiver, sold and delivered to the railway company certain car springs and spirals, "*which the re-*" *ceiver, after his appointment, continued to use*, and for "which nothing had been paid." Hale, Ayer & Co. also furnished certain supplies to the machinery department. Other materials were furnished "for construction pur-" poses." This Court refused to allow these latter, but ruled that payment should be made for the supplies "to "the machinery department," and for such supplies "only." [*Ibid.*, 392.]

These supplies "to the machine department," which the receiver used after his appointment, stand upon a different basis from the claim at bar. Even if put into the machinery before the receiver took possession, they still contributed to the *permanent* improvement, and enhanced the value of the road.

5. The philosophy of the ruling in *Fosdick* v. *Schall*, is conclusive. The net income only being pledged by the mortgage, if the bondholders have been paid or have received the benefit of that part of the gross income accrued within a reasonable and limited time before the receivership, which ought to have been applied to necessary repairs and operating expenses, it is but simple justice that what has been thus wronfully diverted should be

restored; but beyond this line no court can pass without trampling upon solemn contract obligations, held sacred through the ages, and subordinating secured indebtedness to that which is general and unsecured.

In commenting upon such injustice, Judge COFER, of the Kentucky Court of Appeals, in his dissenting opinion in *Douglas, etc.*, v. *Cline, etc.*, 12 Bush, 658, says:

"A decision producing, or that may produce, such a result seems to me to overturn the very foundation of contract rights, and virtually to destroy all securities in the form of liens upon property, and to convert an intended benefit attempted to be secured by solemn contract, of which the world had notice, into a positive disadvantage, and to make the lack of all attempt to provide a security by contract the very best possible security, through a supposed discretion of the chancellor.

"Such a conclusion is not the offspring of any recognized or even of an asserted principle of equity. No rules or principles are laid down as conducting to a result so anomalous. It is simply said that the chancellor has a discretion to appoint a receiver or not, when applied to for that purpose, and that in this instance there was no abuse of discretion in so modifying the order of appointment as to require him to pay out of the earnings of the mortgaged property debts due to persons having no contract, or legal or equitable lien on the fund, to the exclusion of those having a lien on the property producing it, and who, it is decided by the majority of the court, have *prima facie*, an equitable claim to the whole fund, and at whose instance the receiver was appointed to rescue it from an insolvent and unfaithful corporation.

"Rights depending upon the discretion of courts are not the most valuable. They can never be measured; their extent and value are unknown, and are incapable of being ascertained."

The same learned Judge, later in the opinion, adds:

"If these appellees have an equity to be paid out of the earnings in the receiver's hands for labour done

before his appointment, because they bestowed their labor on the road and thereby kept it up, why shall not the material men who furnished articles indispensable to the operating of the road be paid also? If the men who furnished necessary material are entitled to be paid, upon what principle of laws or morals shall the men who furnished money to make cash purchases be refused? And if all these are to be paid out of the earnings to the exclusion of the mortgagees, there will remain no debts to be paid but the mortgage debts, and these being postponed to all others it will result that the only persons not secured are those who alone had taken security for their debts." *Ibid.*, (12 Bush), 672.

6. In the foreclosure case of *Dennison et al.* v. *C., A. & St. L. R. R. Co.*, 4 Bissell, 414, intervening petitioners, who had furnished supplies to the railroad company before the receiver was appointed, claimed that they had an equitable lien upon the moneys under control of the court, arising from the sale of the property, and received from the earnings of the road. The distinguished Judge of the seventh circuit, in delivering the opinion of the court dismissing the petitions, remarks:

"Now what equitable lien had these petitioners on that fund? None. Why? Because those who had prior liens came in and swept it away, and more than that, have not, perhaps, been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on; but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a court of equity and cut off the prior lien which exists on the farm and prevent it from being paid. These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien to pay them because those with whom they have dealt cannot do so.

"Upon general principles I hold, what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all, except specific liens, and those, of course, have to be paid in their order."

7. It should be specially noted that the decree from which this appeal is taken directs that the clerk pay the petitioner (appellee) the amount of his intervening claim "out of any money now in the registry of this Court, in "this cause, arising from the sale of the railroad property "and assets covered by the mortgage or deed of trust "aforesaid, or if sufficient money is not now in such reg- "istry, then that he pay the aforesaid amount of said "claim to the petitioner out of any money arising from "such sale that may hereafter come into the registry of "the Court." [Rec., folio 15.]

It should likewise be noted that in the first two points stated in the certificate of division, the question is submitted whether the Court "had the power to direct the "payment out of the money in the registry of the Court, "or that might thereafter be paid into the registry of the "Court, arising from the sale of the property covered by "the mortgage or deed of trust, of claims for labor, sim- "ilar to those stated in the petition in this case, in prefer- "ence to the claim arising upon the mortgage or deed of "trust to the complainant in this case," etc. [Rec., folios 10, 11.]

The Court below, therefore, ordered appellee's claim to be paid not from earnings of the road during the receivership, but *from proceeds of the sale of the property and assets* embraced in the mortgage. This, we submit, was clearly erroneous.

8. As has been seen, the mortgage or deed of trust

in the case at bar was given "for the purpose of procur- "curing the means necessary to construct and equip" the railroad of the mortgagor. [Rec., No. 1,152, folio 40.]

The railroad was built with the money realized upon the bonds secured by the mortgage, and the bondholders' therefore, have a higher equity than that of ordinary mortgage creditors. In the face of these facts, the Court below (the opinion of the Circuit Judge prevailing) decreed that the proceeds of the sale of the mortgaged property, so far as necessary, be paid out of the registry for labor and supplies furnished the mortgagor within six months before the receiver was appointed, nothwithstanding there is no pretence of any diversion from the current debt fund to or for the benefit of the beneficiaries under the mortgage within that time, or at any other time, unless possibly to the extent of $3,000, in 1876, as heretofore explained.

We respectfully submit that this decree cannot be sustained upon any other basis than that of pushing aside the mortgage contract, and "giving priority to the last "creditor for aiding to conserve the thing," on the principle favored in maritime law, which this Court has expressly determined cannot be done.

Galveston Railroad v. *Cowdrey*, 11 Wallace, 482.

In that case Pulsford's money, secured by the fourth mortgage, completed and gave almost the entire value to the five miles of road upon which he asked the court to give him a first lien (and the iron laid thereon, before it was laid, having been, in a separate article, specially pledged as security to him), because his means "applied "to the road, saved it, and rendered it capable of being

"used, which it would not have been otherwise," [*Ibid.*, 464 and 465], and because when the first three mortgages were executed that portion of the road "was not in "existence, and could not have been conveyed thereby, "and can only be embraced therein on a principle of "equitable estoppel, which is rebutted when it comes in "conflict with a superior equity." [*Ibid.*, 480.]

This Court emphatically repudiated the claim thus asserted. Mr. Justice BRADLEY, in delivering the opinion, said:

"Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. * * * By the common law it is an inflexible rule, that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, *by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them.*" [*Ibid.*, 481 and 482.]

We make these citations not because they contain any new theories, but because they very forcibly enunciate propositions of law so old that "the memory of man "runneth not to the contrary," and because the philosophy of the opinion and decision is fatal to the theory which underlies the decree in the case at bar; by which decree

proceeds of the sale of the mortgaged property are directed to be paid to the full amount of an unsecured claim, some six years the junior of the indebtedness secured by the deed of trust, thereby "giving priority to the last "creditor for aiding to conserve the thing," contrary to the established rules of equity.

In our view, the equities of Pulsford in the *Cowdrey* case were far superior to those of appellee in the case at bar. All there was of the five miles of railroad, upon which he sought a lien, was created by means of his money, and yet the prior mortgages took it all. Appellee's claim at bar receives its only vitality in the present controversy, because of its relation to what was done in the way of "aiding to conserve" the mortgaged property.

Those who furnished labor or materials, in thus "aiding "to conserve" the property, did so with full knowledge of the mortgage recorded years before, and "consented to" the benefits resulting to the road from such labor and materials "being covered by the mortgage in question. "They acquired no lien which can displace" it. Their only reliance for compensation was upon the gross earnings of the road. They took their chances as to the sufficiency of such earnings. If these were diverted to the benefit of the mortgage creditors, then, and not otherwise, can restitution be enforced, as clearly demonstrated in *Fosdick* v. *Schall*.

9. No Statutory Lien.—Attention is called to the fact that the mortgage under consideration in this cause, executed October 2, 1871, was "recorded before the first "day of February, A. D., 1872, in the offices of the "recorders of the various counties in the State of Illinois,

"into or through which the line of the railroad was located "and afterwards constructed." [Rec., folio 4.]

On July 1st following, an act of the legislature of that state went into effect, which had been passed April 3rd, 1882, by which act a lien was given to "contractors, sub-"contractors and laborers" for "their claims against "railroad companies," under certain limitations and conditions. [R. S. 1874, p. 671; R. S. 1877, p. 639; R. S. 1881, p. 701.]

It will be observed, therefore, that the mortgage had been both executed and recorded before the act was passed, and at least five months before it went into effect; so that the statute can have no possible bearing in the present controversy. Nor is there any pretense that any steps whatever were taken under the statute in order to acquire a lien thereunder. These were essential in case the statutory provisions could be invoked at all.

III.

Net Earnings during the Receivership.

Opposing counsel contended below that because the net earnings of the road during the receivership "were ap-"plied from time to time, *by order of the Court*, for the pre-"servation of the property, and, with the consent of the "complainant" below, "in purchasing additional grounds "and rolling stock, etc., and in making permanent repairs "or improvements upon said railroad property, instead of "discharging therewith the claims against said Railroad "Company for labor, materials, and supplies," [Record, follo 8]; because this was done, opposing counsel contended below, and will doubtless urge here, that the bond-

holders got the benefit of earnings which should have been applied to discharge indebtedness incurred by the Railroad Company for labor and supplies, and hence that restoration should be made out of the proceeds of the sale. The position urged was, and doubtless will be here, that the net income of the road during the receivership was a fund in the control of the Court to be applied for the benefit of all parties concerned, and that because, in the order appointing the receiver, direction was given for the payment, out of the net income of the receivership, of amounts due by the Railroad Company for labor and supplies furnished to the Company within the preceding six months, which direction was not followed, but such income was used otherwise as stated, therefore there was such a diversion of that income as requires restoration to be made out of the proceeds derived from the sale of the *corpus*.

1. This position is a *non sequitur*. Even if it be urged that the direction for the payment of the Railroad Company's indebtedness for labor and supplies, as contained in the order appointing the receiver, was the exercise of a "*sound judicial* discretion," (which we insist it was not, without proof of diversion of the gross income by the Railroad Company to or for the benefit of the mortgage creditors), still, that order was merely an *interlocutory* one, and was subject to modification by the Court below, in the exercise of a like "sound judicial discretion"; and this Court will notice that the disposition that was made of the net income of the receivership, was so made "*by order*" *of the Court below*, expressly given for that purpose. [Rec., folio 8.]

The Court below, having discovered that its order for payment of claims against the Railroad Company for labor and supplies, as contained in the decree appointing the

receiver, was unjust, *rightfully modified* the same by subsequent orders directing the application of the net income earned during the receivership "for the preservation of "the property," "and in making permanent repairs or "improvements," etc. That the Court had authority thus to modify the interlocutory decree, by which the receiver was appointed, there can be no manner of question. All interlocutory orders in a chancery proceeding, so far as not executed, are "open for revision, and under control of "the court."

Fourniquet et al. v. *Perkins*, 16 Howard, 82, 86.

The claim of appellee, therefore, gains no support whatever from the provision referred to in the order appointing the receiver, in any view that can be taken of the same; for that provision was not permitted to stand, and under the circumstances, must be treated as though no such provision had been incorporated into the decree.

2. We answer, secondly, that the net income of the road, earned during the receivership, belongs to the beneficiaries under the mortgage; and it was not in the power of the Court below to divert the same, or any part thereof, to the payment of any of the general or unsecured indebtedness of the Railroad Company, unless there had been a previous diversion from the gross income of the Railroad Company, within a reasonable or limited time, in favor of the beneficiaries under the mortgage; in which case restoration could be made from the net income of the receivership, as held in *Fosdick* v. *Schall*.

A railroad company, so long as suffered to remain in possession of its property, is generally entitled to the income, rents and profits, of the road, and may contract for

labor and supplies needed in operating and maintaining the property, and creditors furnishing such labor and supplies may attach the tolls due from other corporations; but whenever possession is taken by the mortgagee, through a receiver or otherwise, from that time the beneficiaries under the mortgage are entitled to the earnings of the property. Even before such possession is taken, the mortgagee, when the income is covered by the deed of trust, as in the case at bar, is entitled to the net income of the property. "The income out of which the mort-"gage is to be paid is the net income obtained by deduct-"ing from the gross earnings what is required for neces-"sary operating and managing expenses, proper equip-"ment and useful improvements." *Fosdick* v. *Schall*, 99 U. S., 252.

The net income earned during the receivership, as before suggested, "*prima facie belongs to the mortgage* "*creditors*, and the presumption which thus arises" must be overcome before they can be deprived of it. *Fosdick* v. *Schall*, *supra*, 255.

In *American Bridge Company* v. *Heidelbach*, 94 U. S., 797, a mortgage was given upon the income, rents, issues and profits, as in the present cause. This Court, in the opinion, say that: "In this case, upon the default "which occurred, the mortgagees had the option to take "personal possession of the mortgaged premises, or to "file a bill, have a receiver appointed, and possession de-"livered to him. In either case *the income would there-*"*after have been theirs.*" *Ibid.*, 800.

See also, to the same effect, *Gillman et al.* v. *Ill. & Miss. Tel. Co.*, 91 U. S., 603, 617.

And see also *S. E. A. Ins. Co.* v. *Stebbins*, 8th Paige's Ch., 565; Jones on R. R. Securities, § 114; High on Re-

ceivers, § 643; Jones on Mortgages, § 1536; *Ellis* v. *B. H. & E. R. R. Co.*, 107 Mass., 1; *Hayes* v. *Dickenson*, 9 Hun, (N. Y.), 277; *Post* v. *Dorr*, 4 Edw., (N. Y.), Ch., 412; *Warner* v. *Gouverneur's Ex'rs*, 1 Barb., 36; *Beverly* v. *Scott et al.*, 4 Grattan, 208; *G. & C. U. R. R. Co.* v. *Menzies*, 26 Ill., 121, 148; *M. V. & W. R'y Co.* v. *U. S. Ex. Co.*, 81 Ill., 534, 536.

IV.

Lien Lost by Assignment.

Appellee is "the assignee by purchase of certain ac-"counts or claims for labor performed for the Railroad "Company within the six months next preceding the ap-"pointment of the receiver, which had been by him pur-"chased of the original holders, who performed such "labor, and who assigned such accounts or claims to him, "he paying par therefor;" and for his claim, made up of such assigned accounts, the Court below made him the allowance and rendered the decree of which we complain. [Rec., folios 6, 7.]

1. We maintain that even if the original holders of the claims, entering into the amount decreed in favor of the appellee, could be held to have any equities as against either the net income during the receivership, or as against or as lien upon any of the proceeds of the sale of the property, nevertheless, their lien was *personal, and not assignable*, and cannot be enforced by appellee. Such is the law in the case of a vendor's lien for the purchase price of real estate, even when no rights of third parties intervene. In *Markoe et al.* v. *Andras*, 67 Ill., 34, Mr. Justice Breese,

in delivering the opinion of the Supreme Court of Illinois, says:

"This Court has held, in conformity with the well recognized principle appertaining to that lien which arises by implication of law in favor of the vendor of land, that such lien is *personal*, and *not assignable or transferable*. If the note given for the purchase money of the land be transferred, it does not carry with it, to the assignee, the vendor's lien, so that the assignee can enforce it in his own name. *Richards* v. *Leeming*, 27 Ill., 431. *Such a lien is not assignable even by express language; it is personal, and can only be enforced by the vendor. Keith* v. *Horner*, 32 Ill., 524; *McLowrie* v. *Morans*, 39 Ill., 291;" 67 Ill., 35.

The same doctrine is held in *Elder et al.* v. *Jones et al.*, 85 Ill., 384; *Bonnell* v. *Holt et al.*, 89 Ill., 71; *Small et al.* v. *Stag*, 95 Ill., 39; *Iglehart* v. *Armiger*, Bland's Ch. R., (Md.), 519; *Briggs* v. *Hill*, 6 How., (Miss.), R., 362; *White* v. *Williams*, 1 Paige's R., 501; *Moshier* v. *Meek et al.*, 80 Ill., 79.

2. It has been held by the Supreme Court of Illinois, that even since the statute of that state, which gives a lien against railroad property for labor and supples furnished the company within six months before the commencement of suit, such liens are not assignable, certainly not at law.

In the case of the *C. & V. R. R. Co.* v. *Fackney*, 78 Ill., 116, 119, the Court say:

"These certificates, like the others, were due to those performing the labor, and they had a lien against the road. Defendant in error holds powers of attorney for their collection, but no assignment for these claims. In fact, *they are not assignable* at law, so as to enable him to maintain an action in his own name. But, *even if so assignable, that would not enable the holder to assign the lien.*

If it can be assigned at all, which may be doubted, it would be only equitable." *Ibid.*, 119.

3. Mechanics and material men, who are given liens by statute, have stronger equities than the owners of such claims as that at bar, because they have the statutory lien in addition to their merely equitable claims; and yet it has been repeatedly held that such liens are lost by transfer.

The Supreme court of Wisconsin in *Caldwell* v. *Lawrence*, 10 Wis., 331, say:

"And we have come to the conclusion that such a lien is not assignable, so as to enable the assignee to prosecute the claim in his own name, and avail himself of the lien given by the statute to mechanics and material men. There is nothing in the general statute on the subject making such liens assignable, nor is there anything expressly prohibiting it. But it gives the right to the mechanic, or the one who has furnished the materials. It provides that *he* may file his petition or claim, and contemplates, through all its provisions, that *he* is the one to avail himself of the privileges which it gives. *The general rule is, that a lien is a personal right, and cannot be transferred. Daubginy* v. *Duval*, 5 T. R., 604."

10 Wis., 332.

In *Roberts* v. *Fowler*, 3 E. D. Smith's R., 632, it is held that: "The power to acquire a lien upon real estate, un-
"der the act of 1851, for the better security of mechanics
"and others, is a personal right, conferred exclusively
"upon the very person by whom labor is performed or
"materials are furnished in building, altering or repairing
"a house or its appurtenances. *The lien cannot be effected*
"*by an assignee of the claim* of a contractor, laborer or
"person furnishing materials."

The same doctrine is held in the case of *Rollins* v.

Cross, 45 New York, 767; also, in *Scott* v. *Ward*, 4 Iowa (G. Greene's) R., 112. And see also *Hawley* v. *Warde*, *Ibid.*, 36.

4. The case of *Coal Co.* v. *Cent. R. R. Co.*, 99 New Jersey Eq., (2 Stew.), 252, 255, is based upon the same general principle for which we contend. It holds that a contractor who furnishes the labor of others is not within the benefit of the mechanic's lien laws, the lien being personal to the laborer himself.

Respectfully submitted.

S. CORNING JUDD,
W. F. WHITEHOUSE,
Attorneys for Appellant.

17596

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1882.

(No. 1150.)

THE UNION TRUST COMPANY OF NEW YORK,
Appellant.

vs.

JOHN WALKER,

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT OF THE CASE BY COUNSEL FOR APPELLEE.

THOMAS C. FLETCHER,
Counsel for Appellee.

Pierce Bros., Printers, 217 North Third Street,

—IN THE—

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STATEMENT OF THE CASE BY COUNSEL FOR APPELLEE.

On the 2d of October, 1871, "The Cairo and St. Louis Railroad Company," a corporation under the laws of Illinois, organized to build a narrow-gauge railroad from St. Louis to Cairo, issued two millions and five hundred thousand dollars of bonds, bearing seven per cent. interest, payable semi-annually, and secured them by a deed of trust on the road it proposed to build, and all its after acquired property.

One Henry W. Smithers, representing capitalists, as their agent, purchased the bonds direct from the company at a large discount on their face value, and became possessed of all of them about July, 1872. (See his testimony in the case of this appellant v. E. E. Souther & Bro., No. 1152, in this court, used in this case by stipulation of counsel.)

Smithers looked closely after the investment made for his principals. The railroad company obtained aid in bonds from the city of Cairo, and from Alexander County, Illinois, and from other sources. On the 1st of October, 1873, the railroad company made default in payment of interest. It paid Smithers three thousand dollars at one time for forbearance of interest for two years; but, as he states, in fact it was applied on account of his salary as agent of the bondholders. The railroad was finished in 1874, and it was about that time that the $3,000 was paid. Smithers stood by and did nothing till December 6, 1877, when the proceeding for foreclosure was instituted. After about January, 1877, the railroad company ceased, in a great measure, to pay the laborers engaged in operating the road, and ceased to pay for supplies so far as they could be obtained on credit. The earnings were applied to making permanent and lasting improvements on the road. Handsomely engraved meal tickets were made and issued to laborers in payment of their labor, and for circulation among the employees, and other schemes and devices were adopted to put them off. Finally, on the 5th of December, 1877, the Circuit Court of the United States for the Southern District of Illinois, on the application of the trustee of the bondholders, this appellant, appointed the same Henry W. Smithers receiver of the road. The order and decree appointing him imposed the condition that the labor done and supplies furnished within the next preceding six months, by which the road had been kept running and preserved for the bondholders, should be paid out of the net earnings of the road. (See printed Record, p. 2.) No objection to that provision or condition of the order was heard at the time, but Smithers at once, under that order, took possession of the road and its property as receiver, and continued to operate the road as such receiver up to January 31, 1882, a period of *four yarse and upwards.*

It was proven (see printed record, p. 3) that the net earnings of the road during the receivership were more than sufficient to pay all claims for labor and supplies of the class embraced in the condition or provision of the decree appointing the receiver, but were diverted to the purchase of depot grounds and rolling stock, etc.

Not until May 16, 1881, was the decree of sale entered. It was then found that the principal and interest due on the bonds amounted to $4,301,157.53. The commissioner reported the sale on the 14th of July, 1881, for four million dollars, which was paid in the bonds and coupons secured by the deed of trust. The order required the payment of $100,000 in cash in bidding off the property. On the 12th of December, 1881, the report was approved and the sale confirmed. On December 22, 1881, the court ordered a deed to be made to the purchasers conveying the road and property, "sub-"ject to the lien of any and all claims against "said railroad property and assets which are now "before this court by intervening petitions, and which "shall, upon final determination and adjudication, be "decreed to be paid as liens paramount to the indebted-"ness secured by said deed of trust." The deed was made accordingly on the 30th of January, 1882, and the possession delivered by the receiver on the following day.

In 1877, soon after his appointment as receiver, Smithers caused the claims of persons entitled to be paid for labor done and supplies furnished in operating the road within the six months preceding his appointment, to be audited on the application of the claimant, as shown by the pay rolls and books of the company, and gave to the claimant a certificate thereof, with the provision of the decree for its payment printed on the back of such certificate, and a blank form of assignment of the certificate also printed thereon. The appellee became by purchase, at par value, from the destitute and suffering

laborers, the assignee in legal form of the claims of sundry laborers, whose claims were of the class entitled to be paid under condition contained in the decree, amounting in the aggregate to one thousand, six hundred and seventy-five dollars and sixty-two cents, and on the 6th of June, 1881, filed his intervening petition therefor in said court. On a reference to a special master the facts were so found and reported, and on the hearing the court approved the report, and on the 27th of October, 1882, made the final decree ordering the payment of the claim as set out at page 4 and following of the printed record.

A division of opinion was certified as to the three questions as stated on pages 3 and 4 of the printed record, and the trustees of the bondholders bring the case here by appeal.

APPELLEE'S ARGUMENT.

The questions certified on division of opinion from the Circuit Court, as stated in the printed record, page 3 and 4, have been fully considered, passed upon and answered by this court in the case of Fosdick v. Schell, 99 U. S., 252, and Hale v. Frost, 99 U. S., 391, except as to the right of an assignee to recover a claim which his assignor had, before the assignment, been decreed to be entitled to in equity.

The questions certified may be considered together, the first and second questions differing only in this: that while the first involves only the right to make the order in favor of the original creditors of the claims in controversy, the second involves the right to make such order in favor of the assignee of such original creditors, while the third question certified is general in its character as to the power of the court to make the order in the particular case.

The answer to these questions involves these points:

1st. Is the income earned by the road after the ap-

pointment of the receiver applicable by a Court of Chancery to the payment of debts for labor, which accrued prior to such appointment.

This court, in Fosdick v. Schall, 9 Otto, p. 252, has declared "that every railroad mortgagee, in accepting "his security, impliedly agrees that the current debts "made in the ordinary course of business shall be "paid from the current receipts before he shall have "any claim upon the income."

And in the same case, on page 251, this court says: "The possession taken by the receiver is only that of "the court whose officer he is, *and adds nothing to the "previous existing title of the mortgagees.* He holds, "pending the litigation, for the benefit of whomsoever, "in the end, it shall be found to concern," *and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.*

In the case of Hale v. Frost, 9 Otto, page 391-2, this court, while deciding that the railway mortgage is a prior lien only upon the net earnings of the road after the payment of all the operating expenses while the road is in the possession of the company, also decided: "That the net earnings of the road, while in the possession of the court and operated by its receiver, are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in the payment of claims which have superior equities, if such shall be found to exist," and that certain claims for car-springs, etc., supplied shortly before the receiver's appointment, and continued to be used on the road by the receiver, as well as certain supplies for the machinery department, had superior equities to those of the mortgagees, but denied the superiority of the equities of a claim for materials for construction under the particular circumstances. This was a case where the bondholders funded their interest coupons and allowed the

company to retain possession after default."

In Fosdick v. Schall, *supra*, it was also said, on page 252 that if, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees, to take possession of the future income and hold it for their benefit to require, as a condition for such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do.

This court also declared in the same case, page 253, that if no order (meaning conditions in the decree appointing the receiver) is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting improvements made *out of earnings which ought in equity* to have been employed to keep down debts for labor, supplies and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business * * * because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders, and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which so comes into its own hands as, if practicable, to restore the parties to their original equitable rights. * * * The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors.

Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows, therefore, that if there has been in reality no diversion, there can be no restoration, and that the amount of the restoration should be made to depend on the amount of the diversion.

The court also says, in the same case, page 252, that "the income out of which the mortgagee is to be paid, is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvement.

In Poland v. The R. R. Co. *infra*, it is decided that where default is made, and, as in this case, the mortgagees fail to take steps, at once, to enforce their rights under the mortgage, but permit the mortgagors to retain possession and control of the road and its income, equity will consider labor, etc., done and furnished from that time until the mortgagees take such action, as done for the benefit of the mortgagees and of so much advantage to their security; and that claims for such services will therefore be considered as giving the claimants a superior equitable claim on the earnings to that of the mortgagees.

Fosdick v. *Schall, supra; Galveston R. R* v. *Cowdry* 11 Wall, 482–3; *Gilman* v. *Ill. & Miss. Tel. Co.*, 1 Otto, 616–17; *America Bridge Co.* v. *Heidelboch*, 94 U. S., 800, *Booth* v. *Clark*, 17 How., 331 and 2.

From these declarations of law made by this court, we conclude that the earnings, both before and after the appointment of the receiver, were applicable to the payment of the claims at bar for labor done before such appointment, and the mortgagees had only a claim to such net earnings as might remain in the receiver's hands after payment of all such claims for operating expenses up to the date of the decree—for they could

have no higher claim on such income in the hands of the receiver than they had upon it in those of the company—the appointment of the receiver changed the possession but not the rights of the parties. The rights of the intervenors, therefore, continued at least until the decree of foreclosure and sale. It would be extremely inequitable to say that the mortgagees could, by asking the exercise of the extraordinary powers of a Court of Chancery, free themselves from their implied agreement that such claims should be paid from the earnings before they should have any claim upon the income. And this is true upon general equitable principles, although no order may have been made at the time of appointing a receiver, as a condition of the appointment, for the payment of such claim.

In the well considered case of *Poland* v. *Railroad Company, 52 Vt. 144*, this same conclusion was reached, and is supported by the following cases :

Douglass v. *Cline, 12. W. P. D. Bush, p. 609; The Syracuse City Bank* v. *Talleman, 31 Barb. 209; Duncan* et al. v. *Trustees Chesapeake & Ohio Railroad, 3 Cent. L. J., 579; Atkins & Co.* v. *Petersburg R. R. Co., 3 Hughes* (*Va. Rep.*), *316. etc.* and cases cited in those references; *Ellis* v. *Boston, etc. R. R., 107 Mass., 28-9. Clay* v. *East Tenn. & Virg. R. R. Co.* 6 Heisk., 431.

But this court has said, in the case of Fosdick v. Schall, 9 Otto, page 251-2, that it has "no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceeding for foreclosure, the court, in the exercise of a sound discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable."

It also says "that the chancellor should so mold his order that, while favoring one, injustice is not done to another."

To the same effect are the following cases:

Poland vs. Railroad Co., 52 Vt., 176, &c.; Douglas vs. Cline, 12 Bush (Ky.), 609; Duncan et al. vs. Trustees, &c., 3 Cent. L. J., 579; Gurney v. Allan. & G. W. Ry. Co., 58 N. Y. 366; Syracuse City Bank vs. Tallman, 31 Barb., 201; Nichols vs. Perry Patent Arms Co., 3 Stock. (N. J.) 126.

Here is authority for including in the decree granting the receiver, the clause providing for the payment of claims for labor and supplies which accrued in operating and maintaining the road within six months immediately preceding the decree.

The only question is, was the condition thus imposed a reasonable one? Of this there is no doubt; the men thus protected had contributed to the preservation of the value of the security of the bondholders and to the preservation and the probable increase of the value of its earnings; their claims had accrued so recently that they could not be claimed to be stale, and the decree about to be made would cut off their right to proceed against the property of the company at law.

If the court rightfully made this order, then those in whose favor it was made have a right to demand that it be enforced.

2d. If without an order, in the decree appointing the receiver, these claims could and should have been paid out of the net earnings of the receivership, as it seems it has been shown they can, or if the order in the appointing decree is valid, then the mortgagees received, in the net earnings applied under the orders of the court to purchase additional property and equipment for the road, the fund from which claimants in equity and under the order of the court should have been paid, leaving no fund out of which to pay such claims, and that

not merely to preserve their security in *statu quo*, but to add to and increase it. This was a diversion of the current debt fund, and presumably increased the proceeds of sale to the extent of such diversion. The amount so diverted, equity will compel to be restored from the fund receiving the benefit. The amount of diversion amounted to more than enough to pay these claims. Therefore these claims are equitable, chargeable against the fund in the registry arising from the sale, and can be ordered paid therefrom.

Fosdick v. *Schall*, 9 Otto, p. , and authorities *supra*.

The mortgagees, being the parties entitled to the proceeds of sale, applied for the receiver. Their application was granted on condition that the receiver they asked for should, after paying expenses of his administration, pay these claims and others like them, out of the net income of the road. They accepted the receivership under the decree so conditioned without objection at the time, had their own agent appointed receiver under it, had this receiver apply the net income with the acquiescence of the court, so that the value of the mortgaged property, and, consequently, the proceeds of sale were increased thereby. Having done this they will not now be permitted in a court of equity to say either that the clause in the decree appointing the receiver, which provides for the payment of these claims, is not proper, just and valid, or that the proceeds of sale are not chargeable with the amount diverted.

Douglas vs. Cline, 12 Bush, sup.; Wallace vs. Loomis, 7 Otto, 162-3; Railroad Co. vs. Soutter, 2 Wall, 511; Fosdick vs. Schall, 9 Otto, 253.

Appellee purchased the claims of the laborers *bona fide*, after the decree of the court establishing their lien on the net earnings of the road for their payment, and after they had been audited and certified by the receiver as of the class of claims entitled to be paid under the decree of the court; they were assignable and

appellee is entitled to all the remedies which his assignors had.

Story Eq., 12th Ed., § 1040; Hinkle v. *Wanzer, et al., 58 U. S., 17 How. p. 367.*

In conclusion, counsel for appellee submits that the record and proceedings to which he has a right to refer in this argument lead to the conclusion that, from the inception of the enterprise of building this road, there appear to have been close relations between the company and the bondholders; Smithers certainly represented the bondholders and knew all about the company at every stage of its existence. There does not appear at any time any conflict of action between the company and its bondholders or their agent. Who composed the railroad company, or had any interest in the road at any time, except the bondholders, has not been made to appear in the proceedings in this cause. The solicitors for the bondholders were, to all appearances, the solicitors of the railroad company, for the receiver, for the trustees of the bondholders, and in fact, for everybody concerned, except the men who had preserved the road and property for the bondholders by keeping it in operation.

The latter were not consulted as to the application of the net earnings in the receiver's hands, and among the former there was, of course, under the circumstances, no difference of opinion as to the propriety of putting the earnings into depot grounds and permanent improvements, instead of paying the laborers, as the order of the court required the receiver should do.

The receiver kept the road in his possession, operating it as receiver for upwards of *four years*, while the coupons on the bonds which he represented were maturing and interest accumulating on those already matured, thus aggregating interest to make up the required four millions of dollars, and all through these years this

claimant was getting no interest on the money he had in good faith paid to the men who had performed labor in operating the road, and whose equitable claim to be paid had been decreed by a court of competent jurisdiction in a proceeding in which the bondholders and their trustees, the appellant, and the railroad company were all parties, and made no objection.

The net earnings of the road while in the hands of the receiver, amounting to about two hundred and fifty thousand dollars, were used in buying valuable grounds for depot and other purposes, in East St. Louis and elsewhere, and in equipping the road with fine rolling stock, and in filling trestle-work with earth, and in making other valuable and lasting improvements for the benefit of the purchasers of the road, the bondholders who paid for it in the bonds. The whole amount of the claims for labor and supplies, which the claimants had the good fortune to file intervening petitions for within the time limited by the order of the court does not aggregate $65,000, while the diversion of earnings in excess of expenses of the receivership, including about fifty thousand dollars applied to payment of receiver's salary and extra compensation and his solicitor's fees, amounts to thrice the aggregate of all claims of intervening petitioners for labor and supplies. Appellee insists that, under all the facts and circumstances of this case, the appellant has no standing in a court of equity to question the power of the court to require this claim to be paid out of the proceeds of the sale in its registry, or to be hereafter paid into the registry on that account.

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